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MICHAEL RODAK, JR., CLERK

No. 72-307

Supreme Court of the United States

October Term, 1972

ANTHONY JOSEPH RUSSO, JR. and DANIEL ELLSBERG,
Petitioners,

vs.

WM. MATTHEW BYRNE, JR., Judge of the United States District Court for the Central District of California,
Respondent.

PETITIONERS' REPLY

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Respondent.

PETITIONERS' REPLY

The Government's Brief in Opposition seeks to portray this case as an attempt to appeal an order of minor importance made within the scope of a trial judge's discretionary authority. In fact, however, the case involves a usurpation of power by the district court in defiance of this Court's ruling in *Alderman* v. *United States*, 394 U.S. 165, raising novel issues of fundamental constitutional and practical importance which this Court recognized in *United States* v. *United States District Court*, 407 U.S. 297, as requiring resolution.

I

The Government's brief is essentially a cross-petition for certiorari to review the propriety of the exercise of mandamus jurisdiction by the court below.

The Government's Brief in Opposition rests primarily on the position that the final judgment rule should bar interlocutory review of the trial judge's order by way of

mandamus. So clear is this, according to the Government, that certiorari to consider the substantive issue should be denied. Yet neither Mr. Justice Douglas, in granting the stay which permits petitioners to bring the substantive wiretap issue before this Court, nor the Ninth Circuit panels which stayed the trial proceedings and then reviewed the merits of the wiretap question, accepted this position. Although the Ninth Circuit rejected petitioners' arguments regarding the wiretap issue on the merits, it implicitly assumed the power to decide those questions pursuant to its mandamus jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). Similarly, Justice Douglas, although acknowledging the force of the final judgment rule in ordinary cases, recognized his power to disregard it in extraordinary circumstances, noting:

> "I am exceedingly reluctant to grant a stay where the case in a federal court is barely underway. But conscientious regard for basic constitutional rights guaranteed by the Fourth and Sixth Amendments makes it my duty to do so." *Russo* v. *Byrne*, Opinion of Circuit Justice Douglas, No. A-150 (July 29, 1972).

The actions of the Court of Appeals and of Mr. Justice Douglas establish a flexible mandamus rule, consistent with several other circuits, *infra* p. 4, which constitutes the law of the Ninth Circuit unless this Court decides to review the question by treating the Government's brief as a cross-petition for certiorari. According to this rule, mandamus may be appropriately employed to review district court decisions which constitute a clear abuse of discretion, a usurpation of power, or a decision upon a novel and important question, early resolution of which will contribute to the efficient administration of justice [See the discussion of the criteria for mandamus in *In re Ellsberg*, 446 F. 2d 954, 956 (1st Cir. 1971)]. All three criteria for mandamus are met in this case.

The Government's argument, framed in the language of *Parr* v. *United States*, 351 U.S. 513, assumes the most rigid application of the final judgment rule to each case.[1] It totally ignores subsequent decisions of this Court in which such a formalistic approach to mandamus was rejected in favor of a more flexible and discretionary framework. In those cases, the Court has recognized that while the final judgment rule usually promotes efficiency, it does not always do so. Thus its rigid application is moderated in those extraordinary cases in which interlocutory review will promote efficiency and prevent injustice. See 9 *Moore's Federal Practice*, (2d Ed. 1972), ¶ 110.26, p. 276.

Thus, in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, decided only six months after *Parr*, the Court recognized the discretionary power of courts of appeals to issue interlocutory writs of mandamus when they have potential jurisdiction over the issues raised:

> "Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." 352 U.S. at 255.

The Court went on to note that use of the discretionary power is proper "in exceptional circumstances" where the

[1] The "final judgment" decisions of this Court cited by the Government are not only radically different from the instant one, but contain explicit tempering of the language cited by the Government. Thus, *Cobbledick* v. *United States*, 309 U.S. 323, was an *appeal* from orders denying motions to quash grand jury subpoenas; there, Mr. Justice Frankfurter expressly left open the issue of appealability where constitutional rights might otherwise not be protected. 309 U.S. at 328-329. *Cogen* v. *United States*, 278 U.S. 221, was an appeal from an order denying a motion for the return of documents; there, Mr. Justice Brandeis expressly recognized the distinction between such an appeal and plenary proceedings such as the instant one. 278 U.S. at 225-226. *Will* v. *United States*, 389 U.S. 90, was a Government attempt to review by mandamus a district court order granting a bill of particulars—clearly a matter within its power. *Parr* v. *United States*, 351 U.S. 513 (with four dissents) was es-

district court's action constitutes a usurpation of power, or in exercise of the circuit court's "supervisory control of the District Courts" to insure "proper judicial administration in the federal system." *Id.* at 259-260. Subsequently, in *Schlagenhauf* v. *Holder*, 379 U.S. 104, the Court upheld the use of the mandamus jurisdiction to decide "basic undecided questions" and "to settle new and important problems." *Id.* at 110-111.

Several courts of appeals have read these decisions as permitting immediate review of unusual or important questions, even in interlocutory situations, when in their discretionary judgment the interests of efficiency and justice so demand. See, *e.g.*, *In re United States*, 348 F. 2d 624 (1st Cir. 1965); *International Investment Properties Int'l, Ltd.* v. *I.O.S., Ltd.*, 459 F. 2d 705 (2d Cir. 1972); *Rapp* v. *Van Dusen*, 350 F. 2d 805 (3d Cir. 1965); *United States* v. *Hughes*, 413 F. 2d 1244 (5th Cir. 1969), *vacated* as moot, 397 U.S. 93; *United States* v. *United States District Court*, 444 F. 2d 651, 655-656 (6th Cir. 1971); *Atlass* v. *Minor*, 265 F. 2d 312 (7th Cir. 1959). By proceeding as it has in the instant case, the Ninth Circuit has similarly aligned itself.[2]

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sentially an attempt to review the Government's selection of venue. In *Banker's Life & Casualty Co.* v. *Holland*, 346 U.S. 379, mandamus was sought to vacate a severance and transfer order in a civil suit. Justice Frankfurter in dissenting from the Court's consideration of the case left open the propriety of mandamus review "where postponement of review would involve a protracted trial, entailing heavy costs and great inconvenience." 346 U.S. at 388. So here.

[2] While the *La Buy-Schlagenhauf* doctrine of interlocutory mandamus jurisdiction is substantially reflected in circuit court opinions, problems of application to specific fact situations have produced a variety of results. Compare, *e.g.*, *In re United States*, *supra* (1st Cir.) (Mandamus appropriate to correct a district court order permitting a criminal defendant to take depositions of prospective government witnesses); *Miller* v. *United States*, 403 F. 2d 77 (2d Cir. 1968) (Mandamus appropriate to challenge district court action enjoining inquiries of jurors in a criminal case); *In re Ellsberg*, 446 F. 2d 954 (1st Cir. 1972) (Mandamus "arguably" appropriate to challenge district court order denying disclosure of electronic surveillance in a removal proceeding); *United States* v. *Di Stefano*, Slip Op. Nos. 72-1268, 72-1442 (2d Cir. July 17, 1972) (Mandamus would not lie to challenge a trial judge's dismissal of an indictment for failure to prosecute in a timely fashion); *United States* v. *Hughes*, *supra* (Mandamus appropriate to challenge trial court denial of discove

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The Government, citing *Will* v. *United States*, 389 U.S. 90, erroneously argues for a more rigid restriction upon mandamus in all criminal cases. But *Will* involved a restriction upon the Government's right—not the defendant's right—to mandamus in a criminal case because of the latter's constitutional rights to a speedy trial and to protection against double jeopardy. Indeed, the *Will* Court explicitly refused to rule out the use of mandamus in all criminal cases, and reaffirmed the doctrines of *La Buy* and *Schlagenhauf* even in a criminal context. *Id.* at 97, 107 n. 56. As Justice Black stated in his concurring opinion, 389 U.S. at 108:

> "I agree that mandamus is an extraordinary remedy which should not be issued except in extraordinary circumstances. And I also realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. *Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes.*" (Emphasis added.)

The decisions of the Court of Appeals and of this Court in *United States* v. *United States District Court, supra,* appear to confirm the use of mandamus for the review of an interlocutory order in criminal cases. In that case the Government had a statutory right to appeal an order

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motions in a criminal case); *Ross* v. *Sirica*, 380 F. 2d 557 (D.C. Cir. 1967) (Mandamus appropriate to require district court to hold a post-indictment preliminary hearing for discovery purposes); *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280 (5th Cir. 1968) (Mandamus appropriate to require a district court to admit an out-of-state attorney to defend a criminal defendant); *United States* v. *Dooling*, 406 F. 2d 192 (2d Cir. 1969) *cert. den. sub. nom., Persico* v. *United States*, 395 U.S. 911 (1969) (Mandamus appropriate to challenge trial court's post-trial dismissal of indictment); *United States* v. *United States District Court, supra*, 444 F. 2d 651 at 655-656 (Mandamus appropriate to challenge trial court's order requiring disclosure of logs of unlawful electronic surveillance).

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suppressing the wiretap evidence as illegal. 18 U.S.C. 2518(10)(b).[3] Instead of waiting for such a final judgment to pursue its statutory right of appeal, the Government sought interlocutory review through mandamus of an earlier order, namely the order to disclose. The Court of Appeals approved this action under the *Schlagenhauf* doctrine, 444 F. 2d at 655, 656, and this Court affirmed that approval, 407 U.S. at 301 n. 3, thus setting its seal of approval upon mandamus review of an interlocutory order.

Moreover, no case in the *La Buy-Schlagenhauf* line has diminished the traditional power of courts of appeals to issue mandamus as a means of controlling a district court's usurpation of power or gross abuse of discretion:

> "[W]hen a court has judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of . . . [the All Writs Act]." *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217.

See, *e.g.*, *Buffington* v. *Wood*, 351 F. 2d 292, 294 (3d Cir. 1965); *Grace Lines, Inc.* v. *Motley*, 439 F. 2d 1028 (2d Cir. 1971). And *cf.*, *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (Mandamus inappropriate because petition raised only issues within admitted discretionary power of trial court). As shown, *infra* p. 9, the district judge in the instant case usurped the power to decide the issue of

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[3] 18 U.S.C. § 2518 (10)(b) reads:

> "In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted."

relevance himself in an *ex parte in camera* proceeding, contrary to the holding of this Court in *Alderman* v. *United States, supra.*

Thus, it is evident that the issue of when mandamus is appropriate is much more complex than the Government's brief indicates, and that the Ninth Circuit in the present case acted within the scope of its discretionary authority as established by the decisions of this Court. Even if the Court were disposed to revert to a rigid adherence to the final judgment rule in all criminal cases, the Government's argument would still be misdirected. Denial of certiorari would have no effect either in elucidating this confused procedural area or even in establishing precedent for future cases. Rather, to the extent that the mandamus question is a relevant issue here, the appropriate course would be to grant certiorari not only on the substantive wiretap issue but also on the procedural mandamus question as well.

Indeed, this case, in its present posture, is ideal for such consideration by this Court for the very reason that the Court need not be concerned with the burdens usually occasioned by a delay in a criminal trial. The petitioners' rights to a speedy trial are not at issue since it was the petitioners who sought appellate review. There is no further problem of "keeping the jury on leash." Regardless of this Court's action on the petition, the present jury must be discharged because three months have now elapsed since its selection and its dispersal into the community (See the Gov't's motion to vacate the stay granted by Mr. Justice Douglas, p. 9). There is no double jeopardy problem (assuming that there ever was one, see *Jorn* v. *United States,* 400 U.S. 470). Petitioners have filed an affidavit waiving double jeopardy when a new jury is selected. The Government has not suggested any further burdens which would arise from a grant of certiorari. Indeed, after seeking to convene this Court in Special Term, it waited until the last day

possible (fifty days after the filing of the petition for certiorari) to file its opposition herein, and has made no motion for expedited consideration by the Court. Finally, it is the Government which was responsible for precipitating the wiretap issue in the awkward posture in which it was initially framed. The Government complied with the District Court's discovery order in an extremely evasive manner months after the issuance of the discovery order, waiting until the jury had been impanelled before admitting the existence of the wiretapping. This is not the place to rebut in detail the Government's elaborate apology for its last minute compliance with electronic surveillance discovery (Gov't. Br. pp. 2-7), except to note that at no point does the Government suggest that it did not acquire the wiretap information until July 21.[4] Indeed the inference from the facts is strong and undenied that government counsel sat with the relevant wiretap information at hand for a considerable time prior to the impanelling of the jury.[5]

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[4] The Government has admitted that it began to search for interceptions of attorneys' conversations on or about May 10. (See Affidavit of Warren P. Reese, Supporting Motion for Modification of Order Requiring Investigation and Disclosure Regarding Electronic Surveillance, pp. 12-14 (filed May 20, 1972).)

[5] The problem of the Government's good faith in meeting its responsibilities to answer inquiries regarding electronic surveillance has arisen in many cases. A strikingly similar situation developed in *In re Tierney & Reilly*, Slip Op. Nos. 72-2333, 72-2399 (5th Cir. 1972), where the Government at first denied surveillance in a vague and incomplete manner, only to admit to the Court of Appeals that it indeed *had* overheard an attorney's conversation. In a number of other cases, Government denials of surveillance were *rejected* as too vague; the Government was either directed to submit to a remand "for a factual determination on the alleged use . . . of illegal electronic eavesdropping," *In re Brown*, No. 72-1914 (9th Cir. July 21, 1972), or to "unequivocably affirm or deny the employment of electronic eavesdropping." *In re Stavins*, No. 71-201; *In re Falk*, No. 71-165; *In re Chomsky*, No. 72-4; (D. Mass. Jan. 20, 1972). And in several other cases, the courts disapproved of the manner by which the Government denied surveillance, although refusing to hold that such denials were insufficient as a matter of law. *In re Horn*, 458 F. 2d 468 (3d Cir. 1972); *In re Beverly*, No. 72-2752 (5th Cir. 1972).

II

Ex parte in camera review of the relevance of a foreign intelligence wiretap of defense counsel is so serious a threat to the administration of criminal justice as to require review by mandamus.

A. The Government contends that "the threshhold question where a claim of electronic surveillance is raised is one of standing," (Gov't. Br. p. 13) and cites *Taglianetti* v. *United States,* 394 U.S. 316, 317, for the proposition that the question may be determined by an *ex parte, in camera* review of the surveillance logs. But, as the Government itself admits, the issue in *Taglianetti* was "whether the defendant had actually been overheard" at all. (Gov't. Br. p. 14). The *in camera* review permitted there related to the *identity* of the individual whose voice was recorded, not to the relationship of the contents of the recording to the issues in the case.[6] Likewise the Government's reference to *Giordano* v. *United States,* 394 U.S. 310, (Gov't. Br. pp. 14-15) is inapposite, since *Giordano* did not involve the district court in a consideration of the *content* of the tap, whereas this case, like *Alderman,* requires an adversary hearing on content to determine relevance.

Here, the Government has admitted overhearing the conversation of a member of the defense team in the course of a warrantless foreign intelligence tap. Thus, the question of standing to raise the issue of relevance has already been settled (See Petition, pp. 8-13).

B. Fundamental to the entire posture of this case is the admitted surveillance of a defense lawyer or a member

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[6] In each of the cases cited in footnote 9 of the Government's brief, *in camera* review was permitted only to determine the identity of the voices overheard. In no case was the *in camera* review directed at determining the relation of the *contents* of the conversation to the facts and issues of the case. Thus, the cases were well within the *Taglianetti* holding and are no more controlling here than in *Taglianetti* itself.

of the defense team. Defense counsel cannot be expected to proceed to trial with full vigor while under an unresolved cloud of illegal electronic surveillance. Moreover, disclosure in adversary proceedings protects the courts against the impression that they are involved in the "dirty business" (*Olmstead* v. *United States*, 277 U.S. 438, 470, dissenting opinion of Mr. Justice Holmes) of wiretapping defense counsel, an impression that would not be undone by an acquittal of the defendants or by appellate resolution of the main issues. The evil is compounded where the Government, as here, makes secret submissions not only to the district court, but to the Court of Appeals and to this Court, as if the Attorney General had a different relationship with the Court than defense counsel. Hence, Mr. Justice Douglas rightly followed the example of Mr. Justice White in another wiretapping case, *United States* v. *United States District Court, supra*, 407 U.S. at 343, in declining to look at the secret wiretap log.

Review by mandamus is essential here to the administration of criminal justice, in view of the increasing government surveillance of defense counsel. That issue has just been presented to this Court by a petition for certiorari in *In re Tierney*, 72- ...., bail having been granted by Mr. Justice Douglas (Nos. A49 and A80, September 12, 1972). See also *United States* v. *Seale*, 461 F. 2d 345 (7th Cir. 1972); *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970); *In re Beverly, supra*.

Situations in which there is threatened interference with Sixth Amendment rights to effective assistance of counsel and to a fair trial have been considered especially appropriate for extraordinary relief. Mandamus or injunction has been the usual remedy to correct the actions of the trial court. Thus, in *Laughlin* v. *Eichler*, 145 F. 2d 700 (D.C. Cir. 1944), the D.C. Circuit considered on its merits a petition for mandamus challenging the trial court's removal of a defense lawyer in the course of a criminal trial. In *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280 (5th Cir.

1968), a trial court was required to admit an out-of-state lawyer to practice to defend civil rights criminal defendants. (The proceeding was in the nature of mandamus, although the Circuit Court was reluctant to name the trial judge as defendant, believing that he really did not mean to bar the lawyer from practice. The court made clear, however, that if the trial judge did indeed persist in denying the lawyer admission, a mandamus order would issue.) See also *Sanders* v. *Russell,* 401 F. 2d 241 (5th Cir. 1968); *Cooper* v. *Hutchinson,* 184 F. 2d 119 (3rd Cir. 1950) (Injunction would lie against a state judge who unlawfully interfered with a defendant's choice of out-of-state counsel.)

C. The underlying issue in this case of the legality of warrantless[7] foreign intelligence electronic surveillance is also appropriate for review by mandamus. This issue was explicitly left open by the Court in its recent opinion in *United States* v. *United States District Court, supra.* Like the "domestic security" issue decided in that case, the "foreign intelligence" question "is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion." 407 U.S. at 299. An authoritative statement by the Court is required to clear up the uncertainties and ambiguities on the subject that exist among citizens, courts, and law enforcement officials.

Such a statement is urgently required due to the Government's recognition on the one hand that there really is little difference in practice between warrantless "foreign intelligence" and "domestic security" surveillances,[8] and

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[7] In *Gelbard* v. *United States,* 408 U.S. 41, Mr. Justice White, concurring, suggested that a different rule might apply in a grand jury case "[w]here the Government produces a court order for the 'interception' ". No such order was secured in the instant case.

[8] See Brief for the United States in the *United States District Court* case, pp. 29-31, 34. See also, Reply Brief for the United States, pp. 8-9.

its insistence, on the other hand, that it will continue to engage in the former practice despite the Court's opinion declaring the latter to be unlawful. This raises the real possibility that the Court's landmark decision in *United States District Court* will be undermined by what may well be only a semantic distinction on the part of the Government. (See the opinion of Justice Douglas granting the stay in the instant case.) Indeed, the Government suggested that the tap in the *United States District Court* case itself could have been characterized as a foreign intelligence surveillance. See Brief of the United States in *United States* v. *United States District Court*, pp. 30-31, n. 13.

That the issues raised by national security surveillance —of both the "domestic" and "foreign" variety—are of great public controversy and practical importance need hardly be emphasized. In the past several years, in virtually every criminal prosecution of political dissidents, and in virtually every grand jury proceeding investigating such dissidents, questions of the existence, extent and legality of government wiretapping or bugging have been of central concern.[9]

The scholarly legal commentary on the issues raised by electronic surveillance has been extensive, having increased in proportion to the increase in litigation resulting from the use of the fruits of such surveillance in criminal investigations and prosecutions. Much of the commentary has focused upon the subject of national security wiretapping and bugging, and has generally viewed the Justice Department's assertion of inherent power with disfavor. See *e.g.*, Comment, *Privacy and Political Freedom: Applications of the Fourth Amendment to "National Security" Investigations*, 17 U.C.L.A. L. Rev. 1205 (1970); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1244-1270

[9] See the cases collected in Appendix A to this brief for a summary of the disposition of the wiretap issues.

(1972); Schwartz, *The Legitimation of Electronic Surveillance: The Politics of "Law and Order"*, 67 Mich. L. Rev. 455 (1969); Theoharis and Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 Wayne L. Rev. 749 (1968); Comment, *The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility*, 45 S. Cal. L. Rev. 888 (1972); Spritzer, *Electronic Surveillance By Leave of the Magistrate: The Case in Opposition*, 118 U. of Pennsylvania L. Rev. 169 (1969); Note, *Eavesdropping at the Government's Discretion—First Amendment Implications of the National Security Eavesdropping Power*, 56 Corn. L. Rev. 161 (1970); Comment, 5 Valparaiso U.L. Rev. 561 (1971); Comment, 46 N.Y.U. L. Rev. 1193 (1971); Note, 17 Vill. L. Rev. 175 (1972); Comment, 60 Ky. L.J. 245 (1971); 1972 Wisc. L. Rev. 175 (1972); Navasky, *Kennedy Justice* (1972).

A significant number of such cases have involved issues of foreign intelligence gathering which have not been reached because of the presence of the domestic security issues.[10]

Concern about Government electronic surveillance practices has not been confined to the judiciary. Recent hear-

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[10] See, for example, *United States* v. *Dellinger*, No. 60 Cr. 180 (N.D. Ill., June, 1969); *United States* v. *Hilliard*, No. 69-141 Crim. (N.D. Calif. 1971); *United States* v. *Rudd*, No. 45119 (E.D. Mich. 1971); *United States* v. *Ahmad*, Crim. No. 14950 (M.D. Pa. 1972); *United States* v. *Hoffman*, No. 973-71 (D.D.C. Nov. 23, 1971); *United States* v. *Bacon*, No. 71 Crim. 687 (S.D.N.Y. 1971). In several of these cases, the confusion as to whether the wiretapping concerned "domestic" or "foreign" intelligence gathering was created by the vague terms in which the government affidavits admitting surveillance were framed. In the following cases, issues of foreign intelligence electronic surveillance were directly decided, *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970); *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970); *United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970); *United States* v. *Stone*, 305 F. Supp. 75 (D.D.C. 1969), the issue still remaining one for this Court.

ings before Senator Ervin's Constitutional Rights Subcommittee of the Senate Judiciary Committee focused upon the effect of surveillance practices of all kinds upon the Bill of Rights. Senators and witnesses expressed a growing concern about the Government surveillance practices, including wiretapping and bugging, and the threat that such practices poses to constitutional liberties. See Hearings, *Federal Data Banks, Computers, and the Bill of Rights*, February 23-25, March 2-4, 9-11, 15, 17, 1971, pp. 27, 54, 56, 85, 88 and *passim*. The extension of such wiretapping by former if not present government officials into the current presidential campaign is only the latest incident in a pattern of eavesdropping requiring this Court's consideration.[11]

The foreign intelligence issue was not reached by the lower courts in the instant case because they erroneously concluded that petitioners lacked standing to raise it. The Government's contention that the issue does not exist is misleading; should this Court uphold petitioners standing to challenge the surveillance, the Government will claim that its actions were lawful under the inherent power doctrine by which the Attorney General authorized the wiretaps. Because the issue is inseparable from the case and is of fundamental importance, the Court should consider it together with the standing—relevance issues in granting certiorari. See *Schlagenhauf* v. *Holder, supra*, 379 U.S. at 111-112, *Black* v. *United States*, 385 U.S. 26; *O'Brien* v. *United States*, 386 U.S. 345.

In *Schlagenhauf*, for example, the Court found that the Court of Appeals, in addition to considering one of the issues raised by the petition for mandamus, also should have considered a related second issue "so as to avoid piecemeal litigation and to settle new and important prob-

[11] See, *e.g.*, *More Fumes from the Watergate Affair*, Time Magazine (Oct. 23, 1972), p. 23, which reveals further illegal action by the Watergate wiretappers against the petitioner Ellsberg.

lems." 370 U.S. at 111. Rather than remand to the Circuit Court, however, the Court held that the very importance of the issue made it "appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area." 379 U.S. at 112.

Similarly, in the *Black* and *O'Brien* cases, where issues of electronic surveillance first arose upon the Solicitor General's admissions in this Court, the Court refused to remand for adversary hearings on taint and relevance. Rather, the Court determined that on the merits the convictions must be vacated and new trials ordered.

A parallel situation exists here for the resolution of the legality of the Government's admitted foreign intelligence wiretap upon a member of the defense team—an issue which the Court explicitly left open for future decision. Such review is essential because the Government's conduct poses most serious questions concerning the constitutional right of privacy, the independence of the Bar and the integrity of the judicial process.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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Name & No. of Case	Surveillance Initiated on	Tap of Defendant, Grand Jury Witness	Tap Involved	Dist. Ct. Disposition	Appellate Review	Any subsequent Action

Name of Case	Admitted or Denied	Status of Witness or Lawyer	Foreign Intell. Dom. Se. or Crim. Law	Post-trial Hearing	Appeal	Action on Remand or Otherwise
1. United States v. Dellinger, USDC No. Ill. 6169 69 Cr. 180	Admitted	Defendant	Foreign Intelligence and domestic security	Post-trial 2/26/70 After in camera inspection, court found surveillance to be lawful and therefore required no disclosure	Pending, 7th Circuit Ct. of Appeals, No. 18295	
2. United States v. Seale, 461 F. 2d 345 (7th Cir. 1972) (contempt case; companion to United States v. Dellinger and In re Dellinger	Admitted	Lawyer (counsel team)	Domestic security	Based on in camera inspection of logs held (1) Seale had no standing to object, as taps did not involve his conversations, his premises or his lawyers. (2) No taint possible in summary contempt proceedings	7th Circuit. 5/11/72. Held (1) One of the overheard conversations might be a link in a communication from a lawyer to Seale advising him with respect to his conduct in court. Seale had standing to object to it. (2) The tap was without a warrant, and therefore unlawful. (3) The government must disclose the log of the conversation for use in an Alderman hearing, or dismiss the indictment for contempt	Government has refused to disclose the logs, and in accordance with the Seventh Circuit decision and the Court's opinion in United States v. U.S.D.C., has moved the District Court to dismiss the indictment. See New York Times, Sept. 28, 1972.

. In re Gallinger, 461 F. 2d 389 (7th Cir. 1972) Contempt Case	Admitted, but denied as to surveillance during trial of these defendants or their lawyers		Both	Same as in United States v. Seale	In camera review disclosed that these defendants lacked standing to object to any overheard conversations "possibly bearing" on contempt. Reversed on other grounds. 5/11/72	
4. United States v. Smith, USDC C.D. Calif., Crim. No. 4277-CD, 321 F. Supp. 424	Admitted to Court of Appeals upon appeal of conviction. Remanded to District Court in light of Alderman.	Defendant	Domestic security	1/8/71. Held that surveillance without warrant was unlawful. Required disclosure and an Alderman hearing. 30 day of order for government appeal	9th Cir. 6/22/71. "submission of above case is vacated pending decision of Supreme Court" in United States v. U.S.D.C.	
5. United States v. Sinclair et. al, U.S.D.C. E.D. Mich., No. 44373, 321 F. Supp. 1074.	Admitted	Defendant	Domestic Security	1/25/71 - D. Ct. holds surveillance is illegal and orders government to disclose information or dismiss indictment.	1. Government petitions for mandamus to Sixth Circuit Court of Appeals. Sixth Circuit holds that Dist. Ct. was correct in its holding that surveillance was illegal. Refuses to issue writ. 444 F. 2d 6. . . 2. U.S. Supreme Court affirms lower court decisions. 407 U.S. 297 (1972).	Government refuses to disclose and moves for dismissal. Dismissal granted. July 24, 1972.

Case	Admitted or Denied	Defendant, Witness or Lawyer	Foreign Intelligence, Dom. Sec. or Crim. Law			Dismissed or Otherwise
6. United States v. Hilliard, U.S.D.C. N.D. Calif. Case No. 69-141 Crim.	Admitted	Defendant	Foreign Intelligence and national security	5/4/71. Surveillance was unlawful under Fourth Amendment. Government must disclose or indictment will be dismissed. Indictment dismissed upon oral representation by U.S. Attorney that no disclosure will be made.		
7. United States v. Jaffe & Donghi, U.S.D.C. W.D. N.Y., CR 1970-81 (1/7/71)	Admitted	Defendant	Domestic Security	5/14/71 - D. Ct. finds surveillance unlawful and orders disclosure of surveillance records to defendant.	7/8/71. Denies without prejudice, petition for mandamus, pending disposition by Supreme Court of United States v. U.S.D.C. No dismissal or disclosure will be required pending that decision.	10/6/72. The Government orally moves for dismissal of the indictment.
8. United States v. Rudd, U.S.D.C. E.D. Mich. 9/19/71 95119	Admitted	Defendant	Vague. Seemingly both foreign intelligence and domestic security	Pending		

9. United States v. Iqbal Ahmed, U.S.D.C. M. D. Pa, Crim. No. 14950, 5/13/71	Admitted surveillance of two defendants (Glick and McAllister)	Defendant	Vague. Seemingly both foreign intelligence and domestic security.	11/12/71. District Court suppressed as illegal the overheard conversations of defendants. Issue of taint deferred until after trial.		
10. United States v. Jaffe & Beiber, E.D.N.Y. No. 71 Crim. 480 6/18/71	Admitted			Trial Court ordered disclosure to defendants for a determination of legality of the surveillance. Case resolved on other issue.		
11. United States v. Hoffman, D.D.C. No. 973-71 11/23/71	Admitted	Defendant	Foreign Intelligence and domestic security	11/23/71. 1. Defendant had standing to object to the taps; 2. The domestic security taps were illegal and must be disclosed prior to trial; 3. A "taint" hearing will be held after trial; 4. 12/8/71. District Court stayed its order and all proceedings pending decidion of U.S. Sup. Ct. in United States v. U.S.D.C., supra.		On July 27, 1972, Government moved to dismiss indictment. Motion granted on July 28, 1972.

	Denied	Witness or Lawyer	Dom. Sec. or Crim. Law			Action on Remand or Otherwise
12. United States v. Keen, S.D. N.Y. 71 Criminal 687	Admitted	Defendant	Foreign Intelligence and domestic security	Disposition and trial stayed pending decision in United States v. U.S.D.C. No action yet taken since.		
13. United States v. O'Neal, U.S.D.C. Kansas, KC CR. 1204 8/6/70	Admitted	Defendant	Domestic intelligence	Dist. Ct. held that taps were legal and no disclosure was required. 9/1/70		
14. United States v. Little, Crim. No. 50342-71 Sup. Ct. of D.C.	Admitted	Defendant	Domestic Security	Court denied motion for disclosure, holding taps were legal. 1/12/72		Indictment dismissed subsequent to U.S.D.C. opinion, 7/6/72
15. United States v. Clay, S.D. Tex. Ct. No. 67-11-94	Admitted	Defendant	Domestic Security and Foreign Intelligence	7/1h/69. 1. Ct. required disclosure of all but the foreign intelligence tap. After a hearing, Court found that they were not relevant to defendant's conviction. 2. Court held that the foreign intelligence tap was lawful and did not require disclosure.	430 F. 2d 165 (5th Cir. 1970. 1. Agreed that the disclosed taps were not relevant to defendant's conviction. 2. Examined in camera the foreign intelligence tap. After holding that it was lawful, the court also found that it was not relevant to defendant's	

	Admitted	Witness or Lawyer	Sup. Spc. or Crim. Law			Action on Remand or Otherwise
16. United States v. Brown, USDC E.D. La. Crim. No. 30966	Admitted	Defendant and Lawyer	Criminal Investigation and Foreign Intelligence taps	5/13/68. Dist. Ct. denied motion for disclosure, examined logs of taps in camera, and held that the taps were irrelevant to the issues of the case.	5th Cir. 4/13/69. Slip Op. #26249 - remanded to District Court for further proceedings in conformity with Alderman.	On 9/22/69, the Government disclosed to defendant the logs of the criminal investigation taps. District Court opinion of 7/24/70- 317 F. Supp. 531: 1. The disclosed logs were irrelevant; 2. The fact that the disclosed log revealed a tap of an attorney-client conversation did not require reversal where no taint was shown at a hearing; 3. Foreign intelligence taps were lawful, and need not be disclosed to defendant.
17. United States v. Butenko, U.S.D.C. D. N.J. Crim. No. 418-63	Admitted	Defendant	Foreign Intelligence	318 F. Supp. 66 (10/13/70). On remand from Sup. Ct., 394 U.S. 1651, District Court held that foreign intelligence taps were lawful and did not require disclosure to defendants.		

Case	Admitted or Denied	Grand Jury Witness or Lawyer	Foreign Intell., Non Sup., or Crim. Law			Action on Remand or Otherwise
18. United States v. Stone, USDC Crim. No. 1233-68	Admitted	Defendant	Foreign Intelligence	305 F. Supp. 75 (9/15/69). 1. Katz does not apply, because taps took place prior to that decision; 2. The taps were legal under Section 605 of the Federal Comm. Act. of 1934.		
19. United States v. Fox	Admitted	Defendant	Unclear whether domestic intelligence or criminal investigation	District Court examined in camera; determined no relevance to issues at trial.	5th Circuit - 455 F. 2d 131 (1972). Reversed and remanded for disclosure and an adversary hearing on relevance.	
20. United States v. Scott Camil et al., USDC N.D. Fla. GCR-1344	Government has not yet responded to defendants' motion of 9/14/72 to affirm or deny electronic surveillance			Pending		

	Denied	Witness or Lawyer	Dom Sec. or Crim. Law			Action on Remand or Otherwise
21. United States v. Gelbard	Admitted	Grand Jury Witness	Criminal Law Violations	Held that Grand Jury witnesses may not raise the issue of the legality of the surveillance as a ground for refusing to answer questions. Held witness who refused to answer in civil contempt.	9th Cir. Ct. of Appeals affirmed the contempt citations. 443 F. 2d 837 (1971). Supreme Court reversed, 92 S. Ct. 2357 (1972).	
22. In re Walsh and Egan	Government refused to either affirm or deny electronic surveillance	Grand Jury Witness	?	District Court held witnesses in contempt for refusing to answer questions. Court denied request that Government be required to affirm or deny fact of electronic surveillance	3rd Cir. en banc reversed citations, holding that witnesses could raise issue of whether questions of grand jury were fruits of illegal electronic surveillance. 450 F. 2d 199 (Egan) and 231 (Walsh)(1971). S. Ct. affirmed 92 S. Ct. 2357 (1972).	

Name & No. of case	Surveillance Admitted or Denied	Tap of Defendant, Grand Jury Witness or Lawyer	Tap Involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Any Subsequent Action on Remand or Otherwise
23. In re Evans, et al.	Government refused to either affirm or deny electronic surveillance	Grand Jury Witness	?	District Court held witnesses in contempt for refusing to answer questions. Court refused to order Government to affirm or deny fact of electronic surveillance	D. C. Cir. reversed 9/8/71, 452 F. 2d 1239. Held that witnesses could raise issue of whether questions asked were fruits of unlawful electronic surveillance. Government must affirm or deny its existence. Government petition for certiorari denied by S. Ct., 92 S. Ct. 2379 (1972).	
24. Dixon v. United States	Government refused to either affirm or deny electronic surveillance	Grand Jury witness	?	District Court held witness in contempt for refusing to answer questions	9th Cir. affirmed 8/9/71, 446 F. 2d 669 (1971). Order vacated by Supreme Court, 92 St. Ct. 2501 (1972).	
25. In re Brown, No. 72-1914 (9th Cir. July 21, 1972)	Denied	Grand Jury witness		Witness cited for contempt for refusing to answer questions of Grand Jury	9th Cir. order - 7/21/72 - reversed and remanded "for a factual determination on the alleged use by the Government of illegal electronic eaves-	

... & No. of case	Surveillance Admitted or Denied	Tap of Defendant, Grand Jury Witness or Lawyer	Tap involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Action on Remand or Otherwise
26. In re Stavins, No. 71-201; 27. In re Falk, No. 71-165; 28. In re Chomsky, No. 72-4 (D. Mass, Jan. 20, 1972)	Denied in all three	Grand Jury Witnesses		1/20/72. District Court grants motions of witnesses to quash subpoenas on grounds that the Government affidavits failed to meet the requirements of 18 U.S.C. §3504(a)(1) in that they did not "unequivocably affirm or deny the employment of electronic eavesdropping. Motion granted without prejudice.	Government moved to dismiss its own appeal	Government has failed to submit a less equivocal denial.
29. In re Tierney, No. 72-2333 30. In re Reilly, No. 72-2399, 5th Circuit Court of Appeals	Denied, except admitted an overhear of an attorney pursuant to a court order under 18 U.S.C. 2518 (Government did not admit this until case had reached appeal	Alleged as to Grand Jury witnesses --- Admitted as to an attorney		District Court held that the denial of the surveillance was sufficient. Committed witnesses for civil contempt for failure to answer Grand Jury's questions.	Fifth Circuit (8/3/72) 1. Affirmed district court finding that denials were sufficient; 2. Reviewed in camera, the transcript of the overhear. Held: "It contains nothing of evidentiary substance, nor does it have to do with the right to counsel or the adequacy of representation by counsel. This incident does not afford a basis (Contd)	

& No. Case	Surveillance Admitted or Denied	Tap of Defendant, Grand Jury Witness or Lawyer	Tap Involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Any subsequent Action on Remand or Otherwise
Tierney & Reilly (Contd.)					(Contd) for the refusal of appellants to testify before the grand jury." Bail petition denied by Justice Powell. Bail petition granted pending submission of petition for writ of certiorari by Justice Douglas, 9/12/72 (Nos. A-49 and A-80): a. Despite grant of use immunity, attorney-client privilege still applies; b. important issue of whether there has been a violation of the Sixth Amendment right to counsel, despite the fact that a warrant issued prior to the tap; c. Important issue of whether relevance and taint may be determined by in camera proceeding in this context.	

& No. Case	Surveillance Admitted or Denied	Typ of Defendant, Grand Jury Witness or Lawyer	Typ Involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Any Subsequent action on Remand or Otherwise
31. In re Beverly, No. 72-2752, 5th Circuit Court of Appeals (9/25/72)	Denied Did not respond fully	Grand Jury Witnesses Attorneys		Upheld Adequacy of denials. Cited witnesses for contempt for failure to answer questions.	8/22/72. Bail pending appeal denied by Justice Powell. 8/31/72. Bail pending appeal granted by Justice Douglas because "there has emerged the troublesom question concerning electmaic surveillance of petitioner's attorneys in which I think a hearing is required. 9/25/72. Fifth Circuit vacates the contempt citations and orders the Government to affirm or deny whether it has overheard conversations of the witnesses' lawyers.	
32. In re Grumbles, U.S.D.C. D.N.J.	Denied			Upon refusal to testify, cited witnesses for contempt.	3rd Circuit Court of Appeals affirmed, holding the government's denial was sufficient. 453 F. 2d 119 (1971).	

Name & No. of case	Surveillance Admitted or Denied	Tap of Defendant, Grand Jury Witness or Lawyer	Tap involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Any subsequent action on Remand or Otherwise
33. In re Horn, U.S.D.C. M.D. Pa.	Denied			Upon refusal to testify, cited witnesses for contempt 3/3/72	3rd Circuit affirmed on the basis of Gruubles. 458 F. 2d 468 (3/14/72)	